STATE OF MICHIGAN

COURT OF APPEALS

EASTERN OIL COMPANY, Plaintiff-Appellant, v MARY ERMATINGER and CADILLAC OIL COMPANY, Defendants-Appellees.	UNPUBLISHED August 25, 2009 No. 284286 Oakland Circuit Court LC No. 05-070411-CZ
EASTERN OIL COMPANY, Plaintiff-Appellee, v MARY ERMATINGER and CADILLAC OIL COMPANY, Defendants-Appellants.	No. 284442 Oakland Circuit Court LC No. 05-070411-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent from the majority opinion reversing the entry of default judgment by the trial court in this matter.

While, as cited by the majority, "the law favors the determination of claims on their merits," *Alken-Zeigler, Inc v Waterbury Headers Corp,* 461 Mich 219, 229; 600 NW2d 638 (1999), I would also note that it is not the policy of this state to set aside defaults or default judgments that have been properly entered. *Id.* at 229; see also *Shawl v Spence Bros, Inc,* 280 Mich App 213, 221; 760 NW2d 674 (2008). In this instance, based on a thorough review of the file and pleadings, I believe that sufficient notice was provided to defendants for the valid effectuation of process.

The majority concludes that defendant, Mary Ermatinger, was "never served" because neither personal delivery nor certified mailing with a return receipt occurred pursuant to MCR

2.105(A). The majority concurrently acknowledges that Ermatinger actively avoided service of process. Contrary to the majority's position, the failure to technically comply with MCR 2.105 does not render service of process ineffective. Notably, the rules applicable to service of process "are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." MCR 2.105(J)(1). As a result, strict compliance with the rules is not mandated. MCR 2.105(J)(3); *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich App 502, 505-506; 448 NW2d 43 (1989). Rather, "[t]his Court has held that service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defense." *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987).

Because the purpose underlying the rules governing service of process is to provide actual notice of a lawsuit and an opportunity to defend, MCR 2.105(I)(1), courts shall not dismiss an action based on improper service unless the service failed to inform the defendant of the existence of a claim within the time specified within the court rules. MCR 2.105(J)(3); *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991). Contrary to the majority's opinion, the focus is not on the method of process used to provide the notice but rather on whether the service used actually provided timely notice of the complaint to an authorized individual.

With respect to Ermatinger, a process service submitted an affidavit indicating seven separate attempts to serve Ermatinger at her personal residence. One of these attempts involved telephone communication between the process server and Ermatinger in an effort to schedule service, but Ermatinger refused to cooperate in identifying a time to accept service of process. Ultimately, the process server left the summons and complaint "on the door in an obvious place" at defendant's home on November 21, 2005.[1] I note that the motion to set aside default and Ermatinger's attached affidavit avers "I was [sic] never had knowledge of the Summons and Complaint served upon me until after a Default was entered." However, in addition to being nonsensical, as the affidavit both denies knowledge of the existence of a summons and complaint while simultaneously appearing to acknowledge service, the affidavit is disingenuous as Ermatinger does not deny or address receipt of the ex parte motion and order for a temporary injunction nor the averment of plaintiff's attorney that he contacted Ermatinger and informed her of the filing of the complaint and ex parte motion. As this Court observed in *Barclay v Crown Bldg and Dev Inc*, 241 Mich App 639, 646; 617 NW2d 373 (2000), citing with approval 1 Dean & Longhofer, Michigan Court Rules Practice, p 118:

> In determining what constitutes "delivery," the purpose of the service should always be kept in mind. There is little reason, for example, to require a process server to trick an evasive defendant into grasping the papers served. Informing

[1] It appears that the process server also posted the ex parte motion and order to show cause for issuance of a temporary injunction, and related pleadings, at Ermatinger's residence at the same date and time. The lower court file includes a proof of service indicating the notice of default was mailed to Ermatinger, at her home address, on December 27, 2005.

> the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to suffice to constitute "delivery." [Emphasis omitted.]

Further, the validity of Ermatinger's affidavit submitted in conjunction with defendants' motion to set aside entry of default is questionable. The copy contained in the lower court file fails to indicate that the statements contained in the document are based on personal knowledge. MCR 2.119(B)(1)(c); *Regents of the Univ of Michigan v State Farm Mut Ins Co,* 250 Mich App 719, 728; 650 NW2d 129 (2002).

Based on a thorough review of the record, I believe Ermatinger's assertion that she was not served and that the trial court, therefore, lacked personal jurisdiction cannot be supported. The documentation in the record clearly establishes that Ermatinger was extremely aware of the existence of a lawsuit, particularly given the fact that she actively sought to avoid service. Contrary to defendant's assertion, a trial court's refusal to set aside a default judgment should not be reversed based on a failure to strictly comply with the court rules governing service of process if the party in default was timely informed of the existence of the action. *Alycekay, supra* at 506.

Further, I must take strenuous issue with the majority's contention that the default entered against Cadillac Oil should be set aside based on *this* Court's determination that the process server was not credible. It is a well-known precept that it is not the role of this Court to make credibility determinations and that we will not second-guess a trial court's credibility determinations. *Stallworth v Stallworth*, 275 Mich App 282, 286; 738 NW2d 264 (2007). This is particularly true, given the very explicit determination of the trial court on the issue of credibility of Cadillac Oil's resident agent following a hearing:

> Honestly, there's been so much duplicity and chicanery with respect to service in this that I find that Mr. Pequie [sic] through his demeanor, attitude, and tone is not credible.

In addition, a review of relevant transcripts contained in the lower court file demonstrates that Cadillac Oil was also actively avoiding service. Plaintiff's attorney represented, as an officer of the court, that he had attempted to serve Cadillac Oil with pleadings through his runner, who was denied entry to the business. Initially, the process server was also denied access to the building and did not make successful contact with Cadillac Oil's resident agent at his home. Notably, plaintiff's attorney faxed a copy of the temporary restraining order to the business and indicated he received proof that the document was successfully transmitted. Reportedly, the process server did gain access to Cadillac Oil's place of business and believed he served the resident agent, who reportedly threw the papers down and denied service had been effectuated. In addition, on November 29, 2005, a different process server went to Cadillac Oil to serve a copy of the preliminary injunction. A copy of the document was left at the business despite the unwillingness of the receptionist, or any other employee present, to physically accept the documents. While I acknowledge the factual discrepancies or contradictions cited by the majority regarding service specifically on the identified resident agent, it remains within the purview of the trial court to make a credibility determination. As with Ermatinger, and given the active avoidance of service by Cadillac Oil, I believe sufficient documentary evidence exists that the pleadings were delivered and available to defendant in accordance with the intent of the rules governing service of process and placing them on notice of the action. Further, the affidavit of

Cadillac Oil's resident agent, Roger Piceu, submitted in conjunction with defendants' motion to set aside default, suffers from the same deficiencies noted with regard to Ermatinger's affidavit, restricting its validity and its legitimate consideration.

Defendants and the majority appear to confuse the basis for setting aside the defaults from defendants' arguments pertaining to the damages to be awarded. It is clear that Cadillac Oil and Ermatinger sought to set aside the defaults by challenging jurisdiction based on lack of service. Their sole reliance on this position is substantiated by even a cursory review of defendants' motion, which addressed only the purported inadequacy of service. This is further demonstrated by Piceu's affidavit submitted in conjunction with the motion to set aside the default, which states in relevant part:

> My underlying defenses to this cause of action is that I was never served, that I am free and entitled to contract and do business with any 3rd Party which I choose.

Even on reconsideration, defendants alleged only the inadequacy of service of process for setting aside the defaults. Consequently, the trial court correctly resolved defendants' arguments based on the content of their pleadings and denied the request to set aside the default on the basis of service, finding the service of process adequate to meet the intent of the court rules for the provision of notice and an opportunity to defend.

Unfortunately, both defendants and the majority muddy the waters by then attempting to suggest alternative bases involving "good cause" and the existence of "meritorious defenses" to set aside the defaults. However, "good cause" need not be demonstrated, pursuant to MCR 2.603(D)(1), which states:

> A motion to set aside a default or a default judgment, *except* when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. [Emphasis added.]

As such, I believe the majority, following the arguments put forth by defendants, is confusing the requirements and the bases under the various court rules for setting aside the defaults. Arguments pertaining to good cause and meritorious defenses were asserted, not for the setting aside of the defaults, but rather in conjunction with the ascertainment of damages by the trial court. Hence the analysis undertaken by the majority, by evaluating good cause and meritorious defenses, is misplaced with regard to the propriety of the trial court's denial to set aside the defaults.

Although I believe that the trial court's determination to deny defendants' motion to set aside the defaults was correct and precludes the necessity of further review of the other issues set forth, I feel compelled to address the trial court's award based on the majority's decision to remand and the other issues raised in this appeal. Clearly, plaintiff's pleadings do not contain a claim for breach of contract with regard to Cadillac Oil. The complaint only alleges the

existence of a conspiracy between defendants with regard to its claims of misappropriation of trade secrets and tortious interference with a business relationship.[2] As such, Cadillac Oil's contention that it cannot be held liable for a breach of contract is moot because the default does not encompass this claim with regard to this defendant and the final judgment entered by the trial court does not assign to Cadillac Oil damages pursuant to this claim. It is obvious that the award of damages by the trial court is very restricted. The damages in the default judgment awarded plaintiff against Ermatinger are based on the provisions in the non-competition agreement. The trial court assigned none of these damages to Cadillac Oil and, contrary to plaintiff's assertion of joint and several liability, there is no basis for such an assignment. With reference to the damages awarded to plaintiff against Cadillac Oil, they are minimal and represent only lost profits calculated for the finite period of time Ermatinger was employed by that defendant. Further, the trial court denied any continuing injunctive relief to plaintiff based on the natural expiration of the non-competition agreement. As such, I believe the trial court's resolution of this matter to be consistent with the proofs and pleadings put forth by the parties and equitable. Hence, I would affirm the trial court's award and judgment, because I believe remand is both in error and will result in the unnecessary and wasteful expenditure of judicial resources.

/s/ Michael J. Talbot

---

[2] I believe the allegation of conspiracy is not supportable because a cause of action does not exist for civil conspiracy between a corporation and its agents acting in the scope of their employment. *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996). However, the claim is rendered irrelevant based on the trial court's ultimate decision and award of damages and the legal recognition that a "conspiracy standing alone without the commission of acts causing damage would not be actionable. The cause of action does not result from the conspiracy but from the acts done." *Terlecki v Stewart*, 278 Mich App 644, 653; 754 NW2d 899 (2008). As such, the default on the conspiracy claim is immaterial, as damages were neither awarded nor attributable to that claim.